

Claimant alleges he injured his neck while driving a truck for respondent on September 20, 1996. Claimant testified he hit his head on the overhead storage compartment when the truck he was driving from Walcott, Iowa, to Chicago, Illinois hit a bump. After arriving in Chicago, claimant testified he had trouble opening the back door of the truck in order for the truck to be unloaded. When the door finally opened, it jerked claimant to the right and claimant heard a crack, somewhat like a knuckle cracking.

Later that day, claimant felt pain in his neck and down his left arm. Claimant testified he laid down while his truck was being loaded for the return trip to Topeka, Kansas. Claimant testified, when he got up from his nap, the pain was so severe he could hardly complete the drive to Topeka.

Claimant sought medical treatment the day after his injury, September 21, 1996, at Med-Assist, a minor emergency center. The physician at Med-Assist examined the claimant and placed him in a cervical collar and prescribed pain medication for his neck problem. Claimant was seen again on September 24, 1996, by the Med-Assist physician. Because claimant was not improving, the physician referred claimant to orthopedic surgeon, Joseph W. Huston.

Claimant saw Dr. Huston on September 25, 1996. Dr. Huston prescribed pain medication for claimant and had claimant continue wearing the cervical collar. Dr. Huston also took claimant off work. Claimant had an MRI examination of his cervical spine on October 16, 1996. The examination found a left sided herniated nucleus pulposus at C5-6 with encroachment of the left foramen and moderate central left spondylosis at C4-5. Dr. Huston then referred claimant to neurosurgeon Dr. K.N. Arjunan for a consultation on October 23, 1996. Dr. Arjunan prescribed pain medication and claimant was kept off work until November 24, 1996.

Claimant testified he notified one of his supervisors, Jim Meyers, about the work-related accident by telephone on the September 21, 1996, the day after the accident and the day he arrived back in Topeka, Kansas. The respondent offered and the Administrative Law Judge admitted into evidence the original of the receipt of written claim for compensation signed by Mickey L. May, also a supervisor for the respondent. The receipt has the claimant's name, date of alleged accident, and date respondent received the receipt of November 20, 1996. Claimant's name and date of alleged accident are written with black ink. Mickey L. May's signature and date claim received are in blue ink. But the date indicating the date claim was received was originally written in blue ink as November 20, 1997, and the 7 has been written over in black ink with a 6. Claimant testified he served the written claim on respondent on November 20, 1996, but Mickey L. May wrote in the wrong date of 97. The claimant testified he then changed the date by writing over the 7 with the 6 with a black ink pen.

The respondent also offered and the Administrative Law Judge admitted into evidence a copy of an Application for Hearing filed by claimant with the Division of Workers Compensation on December 4, 1997. Claimant signed the Application for Hearing on November 20, 1997. Claimant testified it was just a coincidence that the Application for Hearing was signed exactly one year after claimant served the respondent with a claim for compensation. Respondent, however, argues that claimant prepared both the claim for compensation and the Application for Hearing on November 20, 1997, and served the claim on respondent on November 20, 1997, instead of November 20, 1996.

Respondent's attorney, during the preliminary hearing, notified the Administrative Law Judge that the respondent had filed an Employer's Report of Accident within two or three days following claimant notifying the respondent of the accident. Therefore, claimant had 200 days from September 20, 1996, the date of accident, to serve a timely written claim on the respondent as required by K.S.A. 44-520a. If the written claim was served on November 20, 1997, as argued by the respondent, claimant is barred from receiving workers compensation benefits.

The answer to the question of whether claimant served the respondent with a written claim for compensation on November 20, 1997, or November 20, 1996, hinges on claimant's credibility. The Administrative Law Judge had the opportunity to personally observe the claimant testify before him. Thus, the Administrative Law Judge had the opportunity to observe the claimant's demeanor and judge his credibility. The Administrative Law Judge found the claimant had not served a timely written claim on the respondent. Therefore, the Administrative Law Judge had to find the claimant was not truthful. The Appeals Board finds that some deference should be given to the Administrative Law Judge's findings and conclusions because he was better able to judge claimant's credibility. Therefore, giving some deference to the Administrative Law Judge, the Appeals Board concludes, for preliminary hearing purposes, that the claimant failed to serve a timely written claim for compensation on the respondent.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order Denying Compensation dated January 16, 1998, entered by Administrative Law Judge Floyd V. Palmer should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March 1998.

BOARD MEMBER

c: Joseph Lynn Friday, Topeka, Ks
Richard W. Morefield, Kansas City, MO
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director